No. 12118

In the United States Court of Appeals for the Ninth Circuit

FRANK W. BABCOCK, APPELLANT

v.

BEN C. KOEPKE, INDIVIDUALLY, AND AS AREA RENT DIRECTOR, LOS ANGELES DEFENSE-RENTAL AREA, OFFICE OF RENT CONTROL, OFFICE OF THE HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DIVISION OF THE SOUTHERN DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF OF APPELLEE

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SUPPLEMENTAL BRIEF OF APPELLEE

INTRODUCTION

This brief is in the nature of a reply brief because the Court on December 20, 1948, ordered appellant to file a brief on the merits in ten days and appellee to file his reply within ten days thereafter. Appellant filed no brief until this Court's order of February 21, 1949. Appellee, however, filed a brief within the time originally specified. Appellee is now in receipt of appellant's brief and feels that his original brief, based on appellant's Statement of Points on Appeal, answers most of appellant's arguments. This supplemental brief, therefore, will endeavor merely to empha-

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size those portions of appellee's original brief which refute appellant's contentions and such additional material as will round out the arguments there presented.

In substance, appellant asserts five principal grounds for reversing the judgment below. They are:

1. That Section 202 (c) of the Housing and Rent Act of 1947, as amended, is self-executing.

2. That the Court has equitable jurisdiction under the Declaratory Judgment Act even though appellant has failed to exhaust his administrative remedies.

3. That under the circumstances of the case compliance with the rule requiring exhaustion of administrative remedies, will constitute a denial of due process because of appellant's alleged inability to make the necessary escrow deposit.

4. That the Court erred in finding that appellee was authorized to issue orders fixing maximum rents applicable to the premises and in fixing such orders to determine whether the premises were or were not controlled and in finding that the notices of proceedings issued by appellee were authorized by Section 840.7 of the Revised Procedural Regulation.

5. That the Court abused its discretion in denying appellant's motion for a preliminary injunction.

These contentions will be considered in order.

ARGUMENT

I

There is no merit to appellant's contention that Section 202 (c) of the Housing and Rent Act of 1947 is self-executing

The Housing Expediter is entrusted with the responsibility of administering the Housing and Rent

Act of 1947, as amended. In so doing he must determine preliminarily whether or not specific housing accommodations are decontrolled. A Court has no jurisdiction to interfere with this preliminary determination.

The appellant argues that the provisions of Section 202 (c) of the Housing and Rent Act of 1947, as amended, are self-executing. It is agreed that if the Housing Expediter concurred in appellant's claim that his property was decontrolled there would be no action required on the part of appellant to establish that fact. But that is very different from a determination that the Housing Expediter may not, in the course of his administration of the rent control program, consider whether or not particular housing accommodations are subject to rent control.

The Housing Expediter is the officer entrusted with administering the powers, functions and duties prescribed under Title II of the Housing and Rent Act of 1947, as amended, which contains the rent control provisions. He is authorized to prevent the collection of rents in excess of those authorized by the Act. In exercising his authority to enforce rent control he must necessarily determine which housing accommodations are and which are not subject thereto. For this purpose Section 204 (d) of the Act grants him the power to issue appropriate regulations. See *Woods* v. *Benson Hotel Corporation,* 75 F. Supp. 743 (D. C. Minn.) affirmed on different grounds, 168 F. 2d 694 (C. C. A. 8th).

The District Court in the *Benson Hotel* case held that Section 202 (c) as it applied to hotels was not

self-operating and that the Housing Expediter was authorized to issue regulations to carry out the duties conferred by the Act. The fact that the Housing Expediter has subsequently relaxed the regulations with respect to hotels does not alter the applicability of the case to those regulations which remain. The Court also held that it would not interfere with the Housing Expediter's administrative action in issuing an official interpretation of the Act and Regulations. The reasoning in this case is applicable to all the exemptions under Section 202 (c). The Court said, at p. 747:

> Section 202 (c) (1) excludes from "controlled housing accommodations" those establishments meeting certain requirements. Defendant claims that it meets the statutory test and that therefore the Housing Expediter has no jurisdiction at all with respect to the Hotel Leamington. However, by the express language of Section 204 (d) "the Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c)." This express reference to 202 (c) when coupled with the wording of that section makes it apparent that Congress intended to give the Expediter authority to issue regulations so as to make the section more specific in view of the policy and purposes of the Act. Furthermore, it authorizes the Expediter, if he deems it advisable (as he has), to require an orderly process of decontrol; that is, those who believe themselves within the exception of section 202

(c) can be required to file applications with the Expediter, who must approve them before decontrol is effectuated (or if approval is improperly denied, relief may be had by proper judicial proceedings). Such a requirement by the Expediter does not seem onerous, objectionable, or a transgression of his statutory authority. The only alternative would be to leave each person, if he believes himself to be decontrolled, to act at his peril. There would be no administrative procedure to which he could have recourse to determine his rights. Such a policy would be chaotic in effect and the policing staff of the Expediter would have to be greatly enlarged in order to obtain even a semblance of compliance with the law. It may well be a burden to many persons to continually fill out the many forms required by governmental agencies, but that burden is the price of living in a society that has determined to exercise some degree of control over economic affairs. It is not for this court to negate that policy, at least in the case at bar.

To echo Judge Joyce if there were no administrative procedure for determining that housing accommodations are not decontrolled, the result would be chaotic.

II

There is no merit to appellant's contention that the court has equitable jurisdiction under the Declaratory Judgment Act even though appellant has failed to exhaust his administrative remedies

As was indicated in the main brief (pp. 10 to 19), the attempt of appellant to secure judicial intervention in this case "is at war with the long-settled

rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted'' (*Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50–51, and cases cited; *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540, 543; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752; *Federal Power Commission* v. *Arkansas Power & Light Company,* 330 U. S. 802, reversing 156 F. 2d 821 (App. D. C.); *Wade* v. *Stimson,* 65 F. Supp. 277 (D. D. C.), affirmed 331 U. S. 493). This ''long-settled rule'' is applicable equally whether the administrative remedy be ''exclusive'' or merely ''preliminary'' to judicial determination. *Aircraft & Diesel Corp.* v. *Hirsch, supra,* 331 U. S. at pp. 767, 773. As Chief Justice Groner, speaking for the Court of Appeals for the District of Columbia, has said: ''On no subject is the opinion of that Court [Supreme Court], as I view it, more definitely fixed than it is on the lack of power of the courts to inject themselves or be injected into proceedings which Congress has committed to the primary jurisdiction of administrative agencies'' (*Miles Laboratories* v. *Federal Trade Commission,* 140 F. 2d 683, 685 (App. D. C.), certiorari denied, 322 U. S. 752; see, also, *Utah Fuel Company* v. *National Bituminous Coal Commission,* 101 F. 2d 426 (App. D. C.)).

The circumstances in the case at bar plainly call for the application of this rule. In the language of the Supreme Court: ''The very purpose of providing either an exclusive or an initial and preliminary determination is to secure the administrative judgment

either, in the one case, in substitution for judicial decision, or in the other, as foundation for or perchance to make unnecessary later judicial proceedings" (*Aircraft & Diesel Corp.* v. *Hirsch, supra,* at p. 767. As stated by the Court of Appeals for the District of Columbia: "To permit judicial review, either by injunction or by declaratory judgment, of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings and would render orderly administrative procedure impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies. That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regrettable but not controlling factor under such circumstances" (*Utah Fuel Company* v. *National Bituminous Coal Commission, supra,* 101 F. 2d at p. 426.)

In the case of *Arkansas Power & Light Company* v. *Federal Power Commission, supra,* the plaintiff utility company attempted to establish whether the Arkansas Public Service Commission or the Federal Power Commission had jurisdiction over its accounts, since each asserted it. Both Commissions were made defendants in a declaratory judgment suit. The District Court of the United States for the District of Columbia dismissed the complaint for lack of jurisdiction of the subject matter (60 F. Supp. 907).

On appeal to the United States Court of Appeals (156 F. 2d 821), that Court reversed, holding that there was an actual controversy over which the District Court had jurisdiction under the Declaratory Judgment Act. The Supreme Court granted certiorari, and in a per curiam opinion (330 U. S. 802) reversed the Court of Appeals in these words: "Judgment reversed on the ground that respondent has failed to exhaust its administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41; *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540." The dilemma of a corporation subject to conflicting orders by independent commissions was much more serious than that of appellant, but the Supreme Court relegated it to the administrative route.

In *Koster* v. *Turchi* (C. C. A. 3d), decided February 24, 1949, the rule requiring exhaustion of administrative remedies was applied to a class suit by a group of tenants seeking a mandatory injunction to restrain the enforcement of certain rent orders increasing the rents of all tenants in the housing project. In this action, the Area Rent Director of Philadelphia and the City of Philadelphia were co-defendants. After determining that the District Court lacked jurisdiction to entertain the action because the statutory minimum of $3,000 was not involved, the Court of Appeals said the following:

> It is also apparent that the appellants have failed to exhaust their administrative remedy. *Gates* v. *Woods,* 4 Cir., 169 F. 2d 440; cf. *Lockerty* v. *Phillips,* 319 U. S. 182, 188. Recourse to the procedure outlined in Section

> 840.5 of the Rent Procedural Regulation 1 (12 F. R. 5916) for a tenant applying for decrease in maximum rent would have materially assisted in the orderly disposition of appellants' problems and might well have eliminated this litigation.

See also, *Abbet Holding Corporation* v. *Woods,* 167 F. 2d 472 (E. C. A.); *United States* v. *Ruzicka,* 329 U. S. 287.

To allow appellant to resort to the courts at this stage of the unfinished administrative proceedings would burden the courts with a problem which might well be unnecessary to decide, for it cannot be assumed at this stage that the administrative proceedings will result in a determination against appellant (cf. *Anderson* v. *Schwellenbach,* 70 F. Supp. 14 (N. D. Cal., 3 Judge Court)).

That plaintiff proceeds by way of declaratory judgment rather than by injunction places it in no better position insofar as the relief here sought is concerned. "The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment" (*Macauley* v. *Waterman S. S. Corp., supra,* 327 U. S. at p. 545, fn. 4; see, too, *Aircraft & Diesel Corp.* v. *Hirsch, supra*).

In *Aircraft & Diesel Corp.* v. *Hirsch, supra,* the Supreme Court sustained the dismissal of a suit for a declaratory judgment on similar grounds. There, a determination as to the constitutionality of the Renegotiation Acts was sought while proceedings were pending in the Tax Court. The Supreme Court dismissed the suit, holding that administrative remedies

must be exhausted before recourse could be had to the courts. It said (at p. 767):

> The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded the administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision.

In a well reasoned opinion the Fifth Circuit Court said the following on this point: "The new power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin" (*Bradley*

Lumber Company v. *National Labor Relations Board,* 84 F. 2d 97, 100 (C. C. A. 5th), certiorari denied, 299 U. S. 559, quoted with approval in *Utah Fuel Company* v. *National Bituminous Coal Commission, supra,* 101 F. 2d at p. 431; see, also, *Doehler Metal Furniture Company v. Warren,* 129 F. 2d 43, 45 (App. D. C.), certiorari denied, 317 U. S. 663; *Aircraft & Diesel Corp.* v. *Hirsch, supra*). As associate Justice (now Mr. Chief Justice) Vinson stated in the *Doehler* case, *supra;* "It is well enough to be attuned to the use of new remedial concepts, but it is something else to increase jurisdiction beyond the other provisions of law by a clever use of remedies" (at p. 46).

The soundness of the doctrine requiring the exhaustion of administrative remedies was also reaffirmed by Congress in enacting the Administrative Procedure Act (60 Stat. 238, 5 U. S. C. 1001, et seq.). While making comprehensive changes in the law governing the operations of Federal administrative agencies, Congress saw fit to leave virtually untouched existing rules relating to judicial review of administrative action. See, Legislative History of the Administrative Procedure Act, Sen. Doc. No. 248, 79th Congress, 2d Session, page 229–230. In particular, as the Attorney General has pointed out, Section 10 (c) "embodies the doctrine of exhaustion of administrative remedies. H. R. Rep., p. 55, fn. 21 (Sen. Doc., p. 289)." Attorney General's Manual on the Administrative Procedure Act, p. 103. Thus, the Section was "designed 'to negative any intention to make reviewable merely preliminary or procedural

orders where there is a subsequent and adequate remedy at law available, as is presently the rule.' Senate Comparative Print, June 1945, p. 19 (Sen. Doc., p. 37)."

In providing in Section 10 (a) of that Act that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof," Congress limited the right to review to "such wrong as particular statutes and the courts have recognized as constituting ground for judicial review * * *. The Attorney General advised the Senate Committee on the Judiciary of his understanding that Section 10 (a) was a restatement of existing law. More specifically he indicated his understanding that Section 10 (a) preserved the rules developed by the courts in such cases as *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938); *Massachusetts* v. *Mellon,* 262 U. S. 447 (1923); *The Chicago Junction Case,* 264 U. S. 258 (1924); *Sprunt & Son* v. *United States,* 281 U. S. 249 (1930); *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113 (1940); and *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940). Sen. Rep., p. 44 (Sen. Doc. p. 230). This construction of section 10 (a) was not questioned or contradicted in the legislative history" (Attorney General's Manual on the Administrative Procedure Act, Prepared by the United States Department of Justice, Tom C. Clark, Attorney General, p. 96, 1947). In view of the foregoing there is no merit whatever to appellant's contention that he is relieved of ex-

hausting administrative remedies because he has resorted to the Declaratory Judgment Act.

When we compare the nebulous nature of the "injury" appellant might suffer by exhausting his administrative remedies with the burden that would be placed upon the judiciary and administrative agencies if appellant's contention were accepted, there can be no question where the choice lies.

Section 202 (c) provides for decontrol of hotels, motor courts, trailer spaces, tourist homes, new construction, converted units, units vacant for specified purposes, and units not previously rented. If appellant is right in his contention that the Court below should take jurisdiction to determine whether his accommodations are decontrolled, then every one of the thousands of other persons who own any of the accommodations referred to in the decontrol provisions of Section 202 (c) would be relieved of exhausting their administrative remedies also, and could insist that the courts make the initial determination of their coverage. If that were the rule, we dare say that the courts would have time for little else than to decide questions relating to a person's claim of decontrol under the Housing and Rent Act of 1947, as amended. As a matter of sound law and practical judicial administration, appellant's contention on this score cannot be sustained as a basis for departing from the established rule that courts of equity will not lend their hand until the prescribed administrative remedies have been exhausted.

Appellant states that there have been hundreds of lawsuits brought and tried since July 1, 1947, in

which the status of housing accommodations was the major issue, and that therefore the Expediter has conceded the jurisdiction of the courts to determine the question of decontrol. Since the Housing Expediter has not been a party to such suits, it is difficult to understand how he could have conceded anything in them. However, the fact that in a proper suit in which the Expediter is not concerned, a court has jurisdiction to determine the fact of control or decontrol has no bearing on the question here at issue, namely, the right of a court to entertain jurisdiction of appellant's suit to restrain appellee from performing his functions as Housing Expediter when plaintiff has not exhausted his administrative remedies and has a plain and adequate remedy at law.

Appellant cites the case of *Columbia Broadcasting System* v. *United States,* 316 U. S. 407. In that case, Columbia brought an action to have an order of the Federal Communications Commission set aside. The Act by virtue of which the Federal Communications Commission issued the order provided specifically that it could be attacked in court in accordance with the procedure followed by Columbia. The issue was whether the order came within the statutory provision, not whether Columbia might obtain a declaratory judgment.

Appellant also cites *Shields* v. *Utah Idaho Railroad Company,* 305 U. S. 177, in which the Court did review a determination of status by the Interstate Commerce Commission. However, in that case, plaintiff sued after exhaustion of its administrative

remedies. The Supreme Court approved the refusal of the District Court to set aside the Commission's action since it was based on evidence adduced during appropriate administrative proceedings. This case illustrates appellee's position exactly. If appellant exhausts his administrative remedies, he will be entitled to a court decision as to the propriety of the action of the Housing Expediter.

Appellant's attempt to distinguish *Gates* v. *Woods,* 169 F. 2d 440 (C. C. A. 4th), cited in appellee's brief, is not convincing. The Housing Expediter is not attempting to "control the process of decontrol," but to determine whether housing accommodations are controlled and therefore is acting within his authorized jurisdiction and consistent with the authority conferred by Congress.

III

There is no merit to the contention that under the circumstances of the case compliance with the rule requiring exhaustion of administrative remedies will constitute denial of due process because of appellant's alleged inability to make the necessary escrow deposit

As stated under Point II, *supra,* appellee's brief covers this point at pp. 10–19. Appellant contends that since he cannot secure a stay of appellee's rent reduction orders unless he deposits the amount of the overcharges in escrow his remedy at law is inadequate. This particular provision has been sustained in the New York cases cited in appellant's brief (p. 12). But as is evident in the quotation from *Macauley* v. *Waterman* set out at page 15 of appellee's original brief mere cost to appellant does not render a remedy

at law inadequate. In *Aircraft & Diesel Corp.* v. *Hirsch, supra,* at p. 5 the amount of money withheld from Aircraft & Diesel Corporation was $204,000 and yet the Court held that did not militate against the need for exhausting administrative remedies. See, also, *Petroleum Co.* v. *Commission,* 304 U. S. 209; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. 2d 97, 100 (C. C. A. 5th), certiorari denied 299 U. S. 559.

It is difficult to ascertain the bearing of *Commonwealth* v. *O'Keefe,* 298 Pa. 169, 148 Atl. 73, cited by appellant on the question under discussion. There the defendant was arrested and tried on the same day and clearly was deprived of his constitutional rights, which is clearly not the case here.

IV

There is no merit to the contention that the Court erred in finding that appellee was authorized to issue orders fixing maximum rents applicable to the premises and, in fixing such orders, to determine whether the premises were or were not controlled and in finding that the Notices of Proceedings issued by appellee were authorized by Section 840.7 of Revised Rent Procedural Regulation

Appellee agrees with appellant that Congress was endeavoring to encourage landlords to place *additional* housing facilities on the rental market. The question is whether these were additional facilities under the statute. This is a question to be determined initially by the administrative agency entrusted with rent control and enforcement (see Points I and II, *supra*). The cited opinions and decisions of the Office of Price Administration and the state court decisions cited

by appellant in his brief (pp. 18–20) do not have any bearing on this question except for *In the Matter of William B. Schwarz,* 4 OPA Opinions and Decisions 3088. There it was agreed, contrary to appellant's reading, that all of the premises except the janitor's apartment had been previously rented because of their Army occupancy.

The statements quoted by appellant concerning the relationship between a college and its students regarding matters of discipline are of little help in determining the problem whether a student is a tenant within the meaning of the Housing and Rent Act of 1947, as amended. The unusual facts surrounding *Hoffman* v. *Apostolic Works, Incorporated,* 3 OPA Opinions and Decisions 5121 distinguish it from the usual college-student situation and deprive it of any weight.

In any event, these are matters to be argued to the Housing Expediter in the administrative proceedings and will undoubtedly be given the weight that they deserve. This Court has before it solely the problem of determining whether the appellee's motion to dismiss was properly granted, not to decide the case upon its merits.

V

There is no merit to the contention that the court abused its discretion in denying appellant's motion for a preliminary injunction

Appellant's argument is addressed at best to the Court's discretion, and as appellee's brief, Points VI and IX, pp. 19–21 shows the Court's discretion far

from being abused, was properly exercised in this case.

CONCLUSION

It is therefore respectfully submitted that the action of the District Court in dismissing the complaint and denying a preliminary injunction is correct and the judgment should be affirmed.

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